SUPREME COURT, U.S.
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Nos. 87-1943 and 87-1956

In the

Supreme Court of the United States

October Term, 1988

MINNESOTA NEWSPAPER ASSOCIATION, INC., APPELLANT

v.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ANTHONY M. FRANK,
POSTMASTER GENERAL OF THE UNITED STATES, ET AL.,
APPELLANTS

v.

MINNESOTA NEWSPAPER ASSOCIATION, INC.

ON APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS APPEAL

MARK R. ANFINSON
Attorney for Minnesota Newspaper Association, Inc.
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

1988 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518 ■ FAX 612-337-8053

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The Minnesota Newspaper Association, Inc. (MNA), Appellant in No. 87-1943, and Appellee in No. 87-1956, moves that the cause in No. 87-1956 be dismissed, or in the alternative that it be vacated and remanded, because it appears that the cause is now moot, fails to present a substantial question, and lacks a sufficient record. The basis for this motion is described below.

MNA has, by a separate request directed to the Clerk pursuant to Rule 53, asked that its appeal in No. 87-1943 be dismissed as well.

Both No. 87-1943 and No. 87-1956 arise out of the same decision of the District Court below. The question presented to the District Court was whether certain federal statutes relating mainly to the United States Postal Service violate the First Amendment when applied to prohibit the dissemination of advertising about gaming that is legal under state law.

The District Court ruled that the challenged statutes were for the most part constitutional. It did however hold that the portion of 18 U.S.C., § 1302 which prohibits the mailing of lists of prizes awarded from a lottery was unconstitutional. No. 87-1956 is an appeal by the federal parties from that part of the lower court's decision.

Since the date on which No. 87-1956 was docketed, Public Laws No. 100-625 and 100-497 have been signed into law. The new legislation would appear to have a major impact on the issues presented in this appeal.

Public Law No. 100-625, titled "Charity Games Advertising Clarification Act," has essentially eliminated the application of the challenged statutes to gaming conducted by local charitable organizations. Public Law No. 100-497, titled "Indian Gaming Regulatory Act," has done the same with respect to games operated by Indian tribes on reservation land. Among other provisions, the new legislation removes the restrictions that prevented the mailing of prize lists with respect to the just described categories of games.

MNA's purpose in bringing this action below was almost solely based on its concerns about the prohibitive effect of Section 1302 and related provisions on advertising in Minnesota newspapers by charitable organizations and Indian tribes. Those concerns have been entirely resolved by the new legislation.

Furthermore, there was a very limited factual record developed below. The only factual submission of any kind in the Court's file was a five page overview of gaming practices in Minnesota and the United States, which was attached as an appendix to MNA's Memorandum of Law in support of its motion for summary judgment. The District Court accepted this over the objections of the federal parties, and the factual content of the appendix was never subjected to the scrutiny imposed by the rules of evidence, since the Court below decided the case on cross motions for summary judgment.

That appendix focuses mainly on charitable gaming. It contains no mention of prize lists. Therefore, no portion of the record below in any fashion refers to the character, use, or possible effect of prize lists disseminated by lotteries. As a result, any discussion of issues involving prize lists in this appeal must be purely a matter of theory and speculation.

The federal parties in effect acknowledge this where in note 19 of their Brief to this Court, they endeavor to describe the reasons why the new legislation does not render their case moot. They claim that there remain situations not reached by the new legislation which would be affected by the District Court's decision.

The situations listed in note 19 are (a) enforcement against use of lists of prize winners by "an illegal numbers racket," (b) "commercial lotteries, such as casinos," and (c) "state-run lotteries" publishing lists in a state that does not conduct such a lottery. While these contingencies may be imagined, there is no evidence whatsoever in the record indicating that such enterprises have ever actually disseminated prize lists by use of the mails, much less any evidence describing the possible purpose, nature, or impact of such dissemination.

The federal parties have in effect created a purely hypothetical case, which involves only improbable and remote contingencies. MNA has little interest in the resolution of the issues that might surround those situations. In no meaningful degree do they appear to affect MNA or its members.

Article III of the Constitution requires that the exercise of judicial power depends on the existence of an actual case or controversy. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). But the passage of the above-described legislation has largely eliminated any case or controversy in this matter. The government's assertions in the particular factual context of this case are really much ado about nothing.

The Court has also repeatedly noted the importance of an adequately developed record with respect to the specific issues on appeal. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. _____, 108 S.Ct. 1645, 1651 (1988). Adherence to such "customary limitations on our discretion" are particularly appropriate where difficult issues of "great public importance are involved." *Id.* Certainly the interpretation and application of the First Amendment

qualifies under this standard, and the Court has recently declined to express detailed views on the proper resolution of First Amendment questions without a thoroughly developed record. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

Additionally, the Court has observed that the degree to which a decision would affect the rights of the immediate parties is also material to the question of mootness. *U.S. Dept. of Justice v. Provenzano*, 469 U.S. 14, 15 (1984).

Consistent with the foregoing considerations, this Court previously remanded a case arising under the same statutory framework for determination as to its mootness, when during the pendency of the appeal Congress amended portions of the law dealing with state-run lotteries. *United States v. New Jersey State Lottery Commission*, 420 U.S. 371 (1975).

If those situations cited at note 19 in the federal parties' Brief really do have some potential to cause problems under the remnants of the regulatory scheme that is at issue here, even after the enactment of the new legislation, then actual cases will certainly appear in which the legal and factual record will be adequately focused. The government may then proceed against the parties that are directly involved in violations, and the issues at stake will presumably be thoroughly developed. The District Court's decision below on prize lists would be fully subject to appellate review at that time. The government therefore risks or loses nothing if the motion herein is granted.

In sum, the legislative developments described above make this case entirely inadequate as a vehicle for resolving issues that could have broad significance. It is therefore respectfully submitted that cause No. 87-1956 should be dismissed, or at minimum, vacated and remanded to the District Court for further proceedings.

Respectfully submitted,

Mark R. Anfinson
Attorney for Minnesota Newspaper Association, Inc.
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

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